United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,325

CHRISP HEARD, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District
Court for the District of Columbia

WILLIAM H. ALLEN
(By appointment of this Court)
PETER J. NICKLES
701 Union Trust Building
Washington, D.C. 20005

Attorneys for Appellant

March 10, 1967

STATEMENT OF QUESTIONS PRESENTED

1. Whether, given appellant's recognized addiction to narcotics and the conclusionary nature of the report on his mental condition rendered by St. Elizabeths Hospital following an examination, appellant could legally be put to trial as competent without the trial court's conducting a hearing concerning his competence and making a judicial determination thereon, whether requested to do so or not.

2. Whether, given appellant's recognized addiction to narcotics and erratic behavior during trial, the trial court was bound, sua sponte, to undertake and conduct during trial an inquiry into appellant's competence to stand trial and make a judicial determination thereon before allowing the trial to proceed to verdict and sentence.

3. Whether appellant was deprived of the effective assistance of counsel during his trial and in preparation therefor, particularly in the preparation and presentation of his insanity defense, or has made a sufficient allegation of such deprivation as to require a hearing pursuant to 28 U.S.C. § 2255.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from denial of appellant's motion for relief under 28 U.S.C. § 2255. On September 1, 1966, this Court granted appellant's motion to remand the case to the District Court to permit the filing of an amended motion for relief under Section 2255. This Court retained jurisdiction over the case and directed the Clerk of the District Court to return to the Clerk of this Court the record as supplemented by the proceedings

on remand. On January 31, 1967, the District Court rendered an opinion denying the relief sought.

STATEMENT OF THE CASE

Appellant was charged in a nine-count indictment with violations of the federal narcotics laws involving the sale and concealment of a narcotic drug. On March 22, 1963, appellant was ordered committed to St. Elizabeths Hospital for examination into and report upon his competence to stand trial and his mental condition at the time the alleged offenses were committed. He had been a user of narcotics since 1948 and had been addicted to narcotics since at least 1955.

Records of the hospital that were before the court and are in the record here show that during appellant's commitment to St. Elizabeths Hospital a staff psychologist, Dr. Christ Kyriazis, conducted a mental examination of appellant. In a report of his conclusions dated April 26, 1963, Dr. Kyriazis stated that appellant's mental state exhibited "some schizoid and paranoid features," and that he "is quite anxious and so emotionally immature that he could act out in an impulsive manner under stress." Dr. Kyriazis went on to state that appellant's adaptation had been "superficial," which resulted

in "poor integrative capacity." The report further pointed out that appellant had "never developed a stable male identification, which results in psychosexual difficulties," and that appellant's responses indicated "hostility and aggression, which prevent him from making meaningful relationships with other people." The doctors and social workers who interviewed appellant at a staff medical conference on June 13, 1963, generally concurred in the opinion of Dr. Kyriazis.

None of this was mentioned in the report submitted by the hospital to the court in the form of a short letter on June 21, 1963. The report was submitted before this Court ruled in Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964), that, under 24 D.C. Code § 301(a), a hospital report concerning competence must be informative.

With respect to appellant's competence to stand trial, the letter stated that appellant had been admitted to the hospital on March 25, that his case had been studied since his admission, that he had been examined by qualified psychiatrists, that his case was reviewed at a staff conference on June 13, and that, "as a result of our examinations and observation, it is our opinion that [appellant] is mentally competent to stand trial." That was all.

Concerning appellant's responsibility for the offenses with which he was charged, the letter went on to state "our opinion" that appellant "was actively addicted to narcotics" on the dates of the alleged offenses and that the offenses, if committed by him, "were causally related to his narcotic addiction." It was the further stated opinion of the hospital authorities that appellant's condition of drug addiction "does not constitute a mental illness, nor is it related to, or a result of, mental illness."

The trial court held no hearing concerning appellant's competence to stand trial, nor did it, so far as appears, make an independent judgment thereon. Apparently it merely accepted the hospital's conclusionary statement that appellant was competent and on that basis put him to trial.

After the jury had been chosen and opening statements made, appellant's court-appointed counsel approached the bench and told the court that the appellant "wants to speak to the Judge." The jury was excused. The appellant was then allowed to speak, and he said:

> "My attorney has asked me to plead guilty in this case and I don't want to plead guilty because I am not guilty. I want to subpoena witnesses and wanted him to subpoena witnesses

> that I asked him to subpoena for me. He said he was going to get doctors in my behalf to testify. I asked him this morning and I told him this last week and he hasn't gotten anyone, he said this morning, so I don't know what to do here." (Tr. 2-3).1/

Counsel denied that he had recommended that appellant plead guilty, denied that appellant had asked him to subpoena certain witnesses and asserted that he, counsel, "had attempted to get certain psychiatrists here in town who hold certain opinions concerning narcotic addicts" but had not been successful. (Tr. 3). Counsel concluded with a request for permission to withdraw from the case, saying that it was apparent that "[appellant] doesn't like my counseling" and "doesn't agree with anything that I have done." (Tr. 3-4). The court denied counsel's request.

At a later point in the trial, appellant accused court-appointed counsel of telling the jury that he was guilty.

> "THE DEFENDANT: Your Honor, Court-appointed counsel inferred I was guilty to the jury.
>
> "THE COURT: The jury doesn't know anything about it.

1/ All transcript references are to the transcript of appellant's narcotics offenses trial, Criminal No. 84-63 in the District Court, which was before the District Court in its consideration of the § 2255 motion and is in the record on appeal in this Court.

> "THE DEFENDANT: I don't want to continue this trial any further with him.
>
> "THE COURT: I have to continue it. You can't have three or four different lawyers assigned.
>
> "THE DEFENDANT: He was telling the jury I was guilty to this charge contrary to my wishes.
>
> "THE COURT: No, he did not. Take a seat down there and we will conclude this trial.
>
> "Bring the jury in." (Tr. 90).

The defense consisted of the testimony of three psychiatrists from St. Elizabeths Hospital. Each of them testified that appellant had been addicted to drugs for many years and that his use of narcotics began in the late 1940's. The testimony of each of them was directed to October 1962, the time of the alleged offenses, and each of them testified that appellant was not suffering from a mental disease or defect at that time. The testimony was subsequently characterized by Chief Judge Bazelon in the following manner:

> "The total time consumed by their testimony, including qualification and cross-examination, cannot have exceeded twenty minutes. Other than reference to Heard's statement that he had been using drugs since the 1940's, there was a complete absence of testimony about his personal history. Other than conclusory statements to the effect that he was

> 'without mental disease or defect,' there was no testimony about his personality structure or mental condition. There was no explanation of the relationship of drug addiction to mental disease. Indeed, there was no meaningful exploration even of Heard's addiction process. Had the jury been charged on the question of responsibility, it would not have known what was meant by the statement that Heard was addicted. It would not have known what effect addiction has on mental processes, except in the situation of deprivation, conceded not to have been present. It would not have known whether addiction is symptomatic of mental disease, what the nature of the disease might be, or how it would bear on the insanity defense. It could not have assessed the adequacy of the psychiatric examination, or have understood why psychiatrists who in other trials stressed the relationship between chronic addiction and disease stated in this trial, in conclusory terms, that Heard had no mental disease or defect." Heard v. United States, 121 U.S. App. D.C. 37, 44-45, 348 F.2d 43, 50-51 (1965).

Appellant did not himself take the stand. The circumstances of his not doing so were explained by counsel to the court:

> "I would like to put this on the record, Your Honor: I have advised the defendant of what will occur with respect to whether he takes the stand or he doesn't take the stand, both from the standpoint of prior conviction being brought out if he takes the stand, and if the defense of entrapment is used, the Government can also show prior convictions even if he doesn't take the stand. I have advised him that I think, in this situation, he ought to take

> the stand. He tells me that he doesn't think he should take the stand." (Tr. 87).

The court declined to give any instruction on insanity. Appellant was convicted on all nine counts of the indictment and sentenced to ten years imprisonment.

On his appeal the question principally mooted was whether the jury should have been instructed on insanity. A division of the Court of Appeals decided, 2 to 1, that the instruction was not required by the evidence and affirmed appellant's conviction. Heard v. United States, 121 U.S. App. D.C. 37, 348 F.2d 43 (1965). A petition for rehearing en banc failed for want of a majority of the circuit judges. Chief Judge Bazelon, one of four judges who voted for a rehearing en banc, wrote an opinion that included the passage quoted above, in which he said that the insanity "defense was so poorly presented as to raise fundamental questions about the adequacy of the defense afforded indigent persons." Id. at 44, 348 F.2d at 50.

Prior to filing the original Section 2255 motion in this case appellant filed a petition for habeas corpus, which was denied without hearing. Leave to appeal was denied on that occasion by the District Court and this Court.

The original Section 2255 motion was filed by appellant pro se on January 26, 1966. The motion made the single allegation that appellant had been deprived of his constitutional right to effective assistance of counsel with particular reference to the presentation of the insanity defense. The District Court denied the motion on May 16, 1966, without a hearing. On July 16, 1966, this Court granted leave to appeal in forma pauperis and appointed counsel. Thereafter, upon motion to remand filed by appellant's court-appointed counsel, this Court, by order dated September 1, 1966, remanded the matter to the District Court while retaining jurisdiction. The purpose of the remand was to permit amendment of the motion to allege that appellant was unlawfully denied a hearing on his competence to stand trial before or during trial. On remand the motion was so amended, and appellant in addition reasserted the issue of ineffective assistance of counsel. The District Court, in an opinion filed on January 31, 1967, denied without hearing appellant's amended Section 2255 motion.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . .."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

STATUTES INVOLVED

Section 301(a) of Title 24 of the District of Columbia Code provides:

> "(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital,

> in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill."

Section 2255 of Title 28 of the United States Code provides:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that

the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT OF POINTS

1. The District Court erred in denying appellant's amended motion under 28 U.S.C. § 2255 because such motion, the papers presented in connection with it and the record of appellant's criminal trial show that appellant, a narcotics addict, was entitled to a judicial inquiry and determination concerning his competence to stand trial.

With respect to Point 1 (argued at pages 20-35, infra), appellant invites the Court's particular attention to a letter from the Acting Superintendent of St. Elizabeths Hospital concerning the results of a mental examination of appellant, dated June 21, 1964, and the records of such examination appended to appellant's reply below to the opposition to his amended Section 2255 motion.

2. The District Court erred in denying appellant's amended motion under 28 U.S.C. § 2255 because such motion, the papers presented in connection with it and the record of appellant's criminal trial show prolonged narcotics addiction, erratic behavior and marked inability of appellant to consult with his counsel during trial such that the trial court was bound to conduct an inquiry into appellant's competence to stand trial before allowing the trial to proceed to verdict and sentence.

With respect to Point 2 (argued at pages 35-39, infra), appellant invites the Court's attention to the following pages of the reporter's transcript of his trial in Criminal No. 84-63: Tr. 2-4, 74-75, 87, 88, 90, 94.

3. The District Court erred in denying without a hearing appellant's amended motion under 28 U.S.C. § 2255 because such motion, the papers presented in connection with it and the record of appellant's criminal trial show that appellant was deprived of the effective assistance of counsel, particularly in the preparation and presentation of his insanity defense, or that, at the least, there was such doubt that appellant enjoyed effective assistance of counsel that a hearing should have been held.

With respect to Point 3 (argued at pages 40-44, infra), appellant invites the Court's attention to the following pages of the reporter's transcript of his trial in Criminal No. 84-63: Tr. 2-4, 74-94.

SUMMARY OF ARGUMENT

I

It is unconstitutional to put a man to trial and convict him unless he is competent to stand trial. Pate v. Robinson, 383 U.S. 375 (1966). The determination whether a defendant is competent must be a judicial

determination and adequate procedures must be provided for making the determination. Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964). The use of experts, psychiatrists and psychologists, to assist the court in making its determination of competence is both natural and desirable. The responsibility for judgment, however, cannot be abdicated to the experts.

Since by hypothesis one is dealing with a person whose competence to make decisions is in doubt, the waiver of a right of constitutional dimensions is not lightly attributed to a defendant who does not request a hearing concerning his competence. In Whalem v. United States, 130 U.S. App. D.C. 331, 346 F.2d 812 (1965), cert. denied, 382 U.S. 862 (1965), this Court, sitting en banc, nevertheless decided that a trial court may, in some circumstances, proceed to trial on the basis of nothing more than a conclusionary hospital report where no hearing is requested. Such circumstances, however, are limited when the hospital report discloses that the defendant whose competence is suspect is a narcotics addict. See Hansford v. United States, U.S. App. D.C. , 365 F.2d 920 (1966); compare Powell v. United States, D.C. Cir. No. 20,102, decided Dec. 28, 1966, petition for rehearing en banc denied, March 3, 1967. That was true of appellant.

It is common medical knowledge that most narcotics addicts have severe psychological problems that precede and contribute to each stage of their addiction. Most chronic narcotics addicts, indeed, are seriously disturbed persons with relatively specific character disorders.

Records of St. Elizabeths Hospital, which underlie the bare conclusionary report of its Acting Superintendent that appellant was competent, show that appellant was afflicted with the psychological problems that one would expect of a chronic narcotics addict. One of the manifestations of the addict's problems is inability to relate to other persons and make meaningful abstract decisions. These are defects that particularly affect competence to stand trial, a legal standard requiring a defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and . . . a rational as well as factual understanding of proceedings against him." Dusky v. United States, 362 U.S. 402 (1960).

In all these circumstances the trial court, apprised that appellant was a narcotics addict, was bound to conduct a hearing into and make a judicial determination of his competence to stand trial. The court failed to do so, and its failure vitiates appellant's conviction and the sentence imposed thereon.

II

A trial court's duty to be certain that a person not competent to stand trial is not convicted as a result of a criminal proceeding in which he is unable fully to participate does not end with the initial decision to put him to trial. Behavior of the defendant during trial may make it necessary that the court inquire into a defendant's mental status during the trial, Pouncey v. United States, 121 U.S. App. D.C. 264, 349 F.2d 699 (1965). In this case, as one might expect from his extensive history of narcotics addiction, appellant was unable to enter into an adequate relationship with his court-appointed counsel, and distrust, manifested on the record on several occasions, permeated a relationship in which trust and confidence of the highest order are legal necessities.

Viewing such behavior and other instances recorded in the trial transcript the trial court was bound to make further inquiry into appellant's competence during his trial.

III

Appellant did not have the effective assistance of counsel in presenting his insanity defense. In some

measure, at least, this was attributable to appellant's lack of trust and confidence in his counsel. For all that the record shows, counsel was not apprised of witnesses appellant wished to have called to make out that defense until after the trial had begun. These witnesses were subpoenaed at the beginning of one trial day and began testifying that afternoon. Counsel's examination of them was cursory, and many of his questions were couched in hypothetical terms having no relationship to the facts of the offenses with which appellant was charged. These facts appearing in the record show ineffective assistance of counsel or at least give rise to a duty on the part of the court below to inquire into whether appellant was effectively represented.

The rejection by the court below of appellant's claim of ineffective assistance of counsel on the ground that the claim had been heard and determined adversely to him is ill founded. The ground of decision of the court below is derived from the remarks made by Chief Judge Bazelon on denial of a petition for rehearing en banc of the affirmance of appellant's conviction on direct appeal. Heard v. United States, 121 U.S. App.

D.C. 37, 43, 348 F.2d 43, 49 (1965). The personal observations of Judge Bazelon concerning the adequacy of representation of indigent defendants generally prompted the majority members of the panel that affirmed appellant's conviction to state that they did not "share Judge Bazelon's view that trial counsel's performance was deficient." Id. at 41 n.7, 348 F.2d 46 n.7. The question of the effective assistance of counsel had not been raised by counsel on the direct appeal. The exchange between the Chief Judge and his colleagues did not amount to an adjudication on the merits as could support a denial of a claim in a Section 2255 proceeding as successive under the rule of Sanders v. United States, 373 U.S. 1 (1963).

ARGUMENT

I. GIVEN HIS RECOGNIZED ADDICTION TO NARCOTICS AND THE CONCLUSIONARY NATURE OF THE HOSPITAL REPORT, APPELLANT WAS ENTITLED TO A HEARING CONCERNING HIS COMPETENCE TO STAND TRIAL AND A JUDICIAL DETERMINATION THEREOF BY THE TRIAL COURT.

It is unconstitutional to put a defendant to trial and convict him unless he is competent to stand trial. Pate v. Robinson, 383 U.S. 375, 378 (1966). The test for competence is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). Adequate procedures must be provided for determining whether a defendant satisfies the test so stated and thus is competent to stand trial. Pate v. Robinson, supra.

Competence, as this Court has frequently emphasized, is a matter to be determined by judges, not by psychiatrists or psychologists. Holloway v. United States, 119 U.S. App. D.C. 396, 399; 343 F.2d 265, 268 (1964); Watson v. United States, 101 U.S. App. D.C. 350, 234 F.2d 42 (1956); Gunther v. United States, 94 U.S. App. D.C.

243, 246, 215 F.2d 493, 496-97 (1954).[1] The procedure for determining competence, therefore, is a judicial procedure culminating in a judgment of a court.

It would nonetheless be idle to pretend that judges do not rely significantly upon psychiatrists and psychologists in making their judgments as to competence. Reliance upon experts is both natural and, within limits, desirable. Abdication of the responsibility for judgment to the experts is impermissible.

Problems arise in the relationship of judges to experts in conditions of the mind, and one of those problems, with which the case of this appellant is concerned, has been much litigated in this Circuit without, we believe, being definitively resolved. The problem can be stated in this way:

A defendant is committed by the trial court pursuant to 24 D.C. Code § 301(a), upon prima facie

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1/ See also Cooper v. United States, 119 U.S. App. D.C. 142, 143, 337 F.2d 538, 539 (1964) (Wright, J. concurring); United States v. Sermon, 228 F. Supp. 972, 974 (W.D. Mo. 1964); Memorandum for the United States submitted in Dusky v. United States, 362 U.S. 402 (1960). Report of the Committee of the Judicial Conference of the District of Columbia on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 118, 125-26 (1965); Hess & Thomas, Incompetency to Stand Trial: Procedures, Results, and Problems, 119 Am J. Psych. 713, 715-16 (1963).

evidence that he is "of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense," for an examination concerning his competence.[1/] The examination is made at St. Elizabeths Hospital, and a letter is sent to the court stating little or nothing more than the bare conclusion of the hospital authorities that the defendant in their medical opinion is competent to stand trial. No hearing is requested by either the prosecution or defense counsel. In what circumstances is the court bound, nevertheless, to conduct a hearing into the defendant's competence -- to go behind the conclusionary hospital report -- in order that the required judicial determination of competence may be made and that there not be an abdication of the judicial responsibility for making that determination.

Because we are dealing by hypothesis with a defendant who may be incompetent, the usual proposition that rights may be lost by waiver has little to do with

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1/ For this Court's interpretation of the prima facie evidence requirement of § 301(a), see Mitchell v. United States, 114 U.S. App. D.C. 353, 359, 316 F.2d 354, 360 (1963).

the problem posed. Thus the fact of there being no request for a hearing is by no means controlling. See Pate v. Robinson, supra at 384; id. at 388 (Harlan, J. dissenting) ("Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers.") And in this Circuit, peculiarly, there is in addition to the conceptual difficulty of attributing an intelligent waiver to a person who may be incompetent to make such a waiver, the practical fact that the dedication of all elements of the bar to the defense of indigent defendants constantly places in criminal trials counsel unaccustomed to being there and relatively unsophisticated in the procedures followed.

In Whalem v. United States, 120 U.S. App. D.C. 331, 346 F.2d 812 (1965), cert. denied, 382 U.S. 862 (1965), this Court en banc decided that nevertheless a trial court in some circumstances may proceed to trial on the basis of nothing more than a conclusionary hospital report where no hearing is requested. In Hansford v. United States, U.S. App. D.C. , 365 F. 2d 920 (1966), petition for rehearing en banc denied, Oct. 14, 1966, the Court seemingly placed limits upon the circumstances in which blind reliance could be placed upon a conclusionary hospital

report in cases, such as this one, where narcotics addiction on the part of the defendant suspected of being incompetent is involved. Compare Powell v. United States, D.C. Cir. No. 20102, decided Dec. 28, 1966, petition for rehearing en banc denied, March 3, 1967.

The Hansford decision followed the decision of the Supreme Court in Pate v. Robinson, where the Court pointed out the constitutional dimensions of the responsibility of the trial court to make a judicial determination of competence. As in Hansford, see 365 F.2d at 925, n.14, so in this case, this Court does not have to reach the question whether the holding of the Whalem case survived Pate v. Robinson, i.e., whether a trial court can ever lawfully make a judicial determination of competence on the basis of an uninformative and conclusionary hospital report such as was submitted to the trial court in appellant's case. For in appellant's case even the conclusionary report was sufficient to present the trial judge with facts that should have compelled him to go beyond the bare conclusion of competence there stated and conduct, sua sponte, a hearing as to appellant's competence to stand trial.

The trial court was presented with a hospital report stating that appellant was actively addicted to narcotics at the time the alleged offenses took place.

(There was no indication that in the 6 months between the date of the offense and the date of the report appellant had been cured of his addiction.)

Although narcotics addiction is as individual in its causes and effects as the personalities of the addicts involved,[1] it is common medical knowledge that most addicts have severe psychological problems that precede and contribute to each stage of their addiction.[2]

Addiction is usually defined as involving: (1) physical dependence on the narcotics, (2) physiological tolerance to the narcotic,[3] and (3) psycological dependence on the narcotic ("craving").[4] Most authorities view the psychological dependence on the narcotic as the

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1/ Eldridge, Narcotics and the Law 14 (1962).

2/ See, e.g., A.M.A. Council on Mental Health, Report on Narcotic Addiction, 165 J.A.M.A. 1707, 1712 (1957); Chapman, Methods of Treatment and Management of Drug Addiction, in Department of Health, Education and Welfare, Narcotic Drug Addiction Problems 71 (Livingston ed. 1963) (hereinafter "Drug Addiction Problems").

3/ See Seevers & Woods, The Phenomena of Tolerance, 14 Am. J. Medicine 546 (1953).

4/ See President's Advisory Commission on Narcotic Drug Abuse: Interim Report 4 (1963).

most significant aspect of addiction.[1] Psychiatrists have been able to classify individuals with certain psychological characteristics as having addiction-prone personalities.[2] These classifications show that most addicts suffer from personality disorders, psychoneuroses or psychopathic characteristics.[3] The great majority of addicts, however, exhibit mixtures of traits associated with neuroses, personality disorders and inadequate personalities.[4] Psycopathic addicts are less common. Narcotics appeal to the psychopath, the neurotic and the psychotic because the drug offers immediate relief from their painful mental conditions.[5]

1/ See, e.g., Chein, The Status of Sociological and Social Psychological Knowledge Concerning Narcotics, in Drug Addiction Problems 146, 148; Wilner & Kassebaum, Narcotics 114, 120 (1965)

2/ See Maurer & Vogel, Narcotics and Narcotics Addiction 73-74 (2d ed. 1962).

3/ Id. at 74.

4/ Wortis, A Physician Views Today's Narcotic Problem, in Drug Addiction Problems 176.

5/ See Chapman, Methods of Treatment and Management of Drug Addiction, in Drug Addiction Problems 70, 71; Noyes & Kolb, Modern Clinical Psychiatry 474 (6th ed. 1963).

Psychiatric studies of addicts usually show them to be individuals whose psychosexual development has been arrested or has regressed to infantile stages.[1] Many psychiatrists see the chronic narcotic addict as relying on opiates to protect himself against paranoid psychosis and to control sadism. Many believe that addiction is closely related to the manic-depressive mental illness.[2] Addiction is also regarded as action that is a substitute for death.[3] In psychiatric terms, most addicts are persons with arrested ego and super-ego development, who have been fixed to an ambivalent maternal figure and deprived of a strong and consistent father figure.[4] This usually means that the addict has never developed internal controls.[5] He must have immediate gratification of his demands. He is, however, constantly frustrated due to the

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1/ Wikler & Rasor, Psychiatric Aspects of Drug Addiction, 14 Am. J. Medicine 566, 567 (1953).

2/ Lehmann, Phenomenology and Pathology of Addiction, 4 Comp. Psych. 168, 174 (1963).

3/ Kielholz & Battegay, The Treatment of Drug Addicts in Switzerland, 4 Comp. Psych. 225 (1963).

4/ Noyes & Kolb, Modern Clinical Psychiatry 474 (6th ed. 1963).

5/ Ibid.

exaggerated nature of his demands, his psychosexual immaturity and his lack of ego capacity.[1]

In general, psychiatrists agree that most chronic narcotic addicts are seriously disturbed individuals with relatively specific character disorders, addiction being only one manifestation of such disorders.[2] The severe and chronic psychological problems afflicting addicts have been described as the same anxieties, conflicts and neuroses confronting other emotionally unstable persons.[3]

What medical authorities thus have to tell us about the psychological problems of narcotics addicts as a group is borne out in appellant's individual case. This would have been known to the trial court had it merely asked, without even necessarily conducting an oral courtroom hearing, to see the records on which the hospital's

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1/ Ibid.

2/ Brill, Misapprehensions About Drug Addiction, 4 Comp. Psych. 157-58 (1963); Freedman, Drug Addiction: An Eclectic View, 197 J.A.M.A. 156, 157 (1966); Chapman, Methods of Treatment and Management of Drug Addiction, in Drug Addiction Problems 70, 71.

3/ Noyes & Kolb, Modern Clinical Psychiatry 477 (6th ed. 1963).

conclusionary report was based. Records of the hospital that are in the record before this Court show that:

1. A staff psychologist, Dr. Christ Kyriazis, in a report dated April 26, 1963, stated that the tests he administered to appellant disclosed

(a) "some schizoid and paranoid features";

(b) that appellant "is quite anxious and so emotionally immature that he could act out in an impulsive manner under stress";

(c) that appellant's adaptation had been "superficial" resulting in "poor integrative capacity";

(d) that appellant had never developed a stable male identification, resulting in psychosexual difficulties, hostility and aggression; and

(e) that appellant's responses indicated "hostility and aggression, which prevent him from making meaningful relationships with other people."

2. The psychiatrist, social workers and another psychologist who interviewed appellant at

a staff conference on June 13, 1963, generally concurred with the opinion of Dr. Kyriazis.

3. Dr. Joseph Bailey, in a report dated May 30, 1963, stated that appellant was unable to relate precisely why he used drugs other than that the world seemed "hostile, impersonal and uninterested" and that people appeared to appellant to be "actively hostile."

4. Mr. Edward Ferguson, a social service worker, in a report dated June 12, 1963, related that appellant's mother had told him that in discussing appellant's drug addiction, appellant stated that "he felt like jumping off Calvert Street Bridge."

Thus appellant's psychological characteristics are distinctly in the pattern of those that have been generally discerned by psychiatrists in their studies of chronic narcotics addicts.

Knowledge that a person has such characteristics at the very least must raise a grave question concerning his competence to stand trial. The legal standard of competence has been quoted above (supra, p. 20) from the Supreme Court's opinion in Dusky v. United States, 362

U.S. 402 (1960). The Court stated that the test must be whether "he [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." This standard is distinct from the standard used for determining criminal responsibility.[1/] See Pate v. Robinson, 383 U.S. 375, 389 (1966) (Harlan, J., dissenting). The standard for competence requires a different kind of comprehension on the part of the accused.[2/] The

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1/ See, e.g., Winn v. United States, 106 U.S. App. D.C. 133, 135, 270 F.2d 326, 328 (1959); Lyles v. United States, 103 U.S. App. D.C. 22, 27, 254 F.2d 725, 730 (1957), cert. denied, 356 U.S. 961 (1958); Pate v. Robinson, 383 U.S. 375, 389 (1966) (Harlan, J. dissenting).

2/ The question whether narcotics addiction is itself a mental disease or defect or a symptom of a disease or defect within the meaning of the Durham rule has been much debated. See Castle v. United States, 120 U.S. App. D.C. 398, 347 F.2d 492 (1964), cert. denied, 381 U.S. 929, 953 (1965); Brown v. United States, 118 U.S. App. D.C. 76, 331 F.2d 822 (1964); Horton v. United States, 115 U.S. App. D.C. 184, 317 F.2d 595 (1963); Bowman, Narcotic Addiction and Criminal Responsibility Under Durham, 53 Geo. L.J. 1017 (1965). But see Heard v. United States, 121 U.S. App. D.C. 37, 348 F.2d 43 (1965). In that part of their report on appellant that concerned criminal responsibility the hospital authorities said that appellant's drug addiction "does not constitute a mental illness, nor is it related to, or a result of, mental illness." A determination of competence does not turn necessarily upon the presence of what may be termed a disease or defect. Cf. Williams v. Overholser, 104 U.S. App. D.C. 18, 19, 259 F.2d 175, 176 (1958) where this Court stated that the last sentence of 24 D.C. Code, § 301(a) means that "the court shall order the accused confined in a mental hospital if it finds that because of unsoundness of mind or for any other reason he is mentally incompetent to stand trial." (Emphasis supplied.)

test for competence requires comprehension of an abstract concept (the legal process) and a comprehension and reasonable mastery of a complex interpersonal relationship (the attorney-client consultative process). The accused is required to understand his legal rights and privileges, the government's role in the prosecution, the evidentiary process, the adversary system and his own role in this abstract framework. Part of his comprehension of the legal process must be gained through his relationship with his attorney. The relationship between the accused and his counsel must be one of confidence, understanding and trust. Through this relationship, the accused must be made aware of the responsibilities the law assigns to him in the preparation and presentation of his own defense.

On the basis of medical authority, there is reason to believe that the individual who is chronically addicted to narcotics has great difficulty both in comprehending the abstract legal process and in entering into an adequate relationship with counsel. The character structure of the addict is such that he has great difficulty formulating honest, clear statements or long-term constructive goals.[1/] One authority has stated that,

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1/ Brill, Misapprehensions About Drug Addiction, 4 Comp. Psych. 155 (1963).

"most chronic addicts are recruited from the ranks of unstable, unreliable people, and . . . the deceptions they practice proceed from their basically unstable personalities."[1] Psychiatrists who have attempted to rehabilitate chronic addicts, who had already been relieved of physical dependence on narcotics, have felt the full impact of the addict's behavior pattern and have reported that:

> "The extent of his [the addict's] dependency, passivity, narcissism, low frustration-tolerance, suspiciousness and unrelatedness to others, his disregard to time, and irresponsibility, made it necessary to alter many staff preconceptions."[2]

The difficulty in rehabilitating these addicts was exacerbated by their general unreliability and "marked unrelatedness to time."[3] Various types of psychiatric treatment had to be abandoned in the rehabilitation process since the addicts proved to be incapable of relating to

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1/ Kolb, Factors That Have Influenced the Management and Treatment of Drug Addicts, in Drug Addiction Problems 25.

2/ Brill, Rehabilitation in Drug Addiction: A Report of the New York Demonstration Center, in Wilner & Kassebaum, Narcotics 218 (1965).

3/ Id. at 219.

psychological services requiring self-examination.[1] There is also reason to believe that protracted narcotics addiction itself has a debilitative psychological effect on the addict in that it changes an individual's conception of himself and his status in society.[2] The basic change in the addict's behavior is the loss of the central aspect, or nucleus, of his personality.[3] Psychiatrists have stated that:

> "Protracted addiction leads to increasingly shallow mental habits, weakening of the conscience, blunting of the sense of duty, tact and responsibility . . .. This destruction of the nucleus of the personality manifests itself in unreliability, dishonesty and mendacity."[4]

It may be seen, therefore, that the psychological characteristics and effects of chronic narcotic addiction are particularly destructive of those qualities of mind that constitute what in legal shorthand we term competence to stand trial.

1/ Ibid.

2/ See Kolb, Drug Addiction: A Medical Problem 110 (1962).

3/ Kielholz & Battegay, The Treatment of Drug Addicts in Switzerland, 4 Comp. Psych. 225, 229 (1963).

4/ Id. at 230.

The trial court knew from the hospital's conclusionary report that appellant was a narcotics addict. No judicial hearing concerning his competence to stand trial had ever been held. Compare Powell v. United States, D.C. Cir. No. 20102, decided Dec. 28, 1966, petition for rehearing en banc denied, March 3, 1967. In the circumstances the court was bound to conduct an inquiry into appellant's competence such that a meaningful judicial determination thereof could be had.

II. GIVEN APPELLANT'S RECOGNIZED ADDICTION AND ERRATIC BEHAVIOR DURING TRIAL, THE TRIAL COURT WAS BOUND TO CONDUCT A COMPETENCY HEARING SUA SPONTE.

The considerations we have discussed in Section I of the Argument herein should have moved the trial court to conduct a hearing concerning appellant's competence before his trial began. The court's responsibility did not end there. In Pouncey v. United States, 121 U.S. App. D.C. 264, 349 F.2d 699 (1965), the defendant had been found competent by the district court on the basis of a conclusionary hospital report, but his behavior at trial cast doubt on that finding. This Court stated that:

> "[A] judge's responsibility to guard against the possibility that an accused person may have become incompetent does not end when the trial begins. A hospital report is only a prediction that when the accused is tried he will be able to participate adequately in the proceedings. Later developments may throw doubt on the prediction, particularly when, as in this case, the report does not show the hospital's understanding of 'competence', the tests it employed, or the certainty of its diagnosis." Id. at 265, 349 F.2d at 700.

The Court held therefore that, despite the earlier finding of competence, the trial court erred in failing to inquire further at the time of the trial.

Here, the predictive value of the hospital report and of the initial determination of appellant's competency was vitiated by appellant's erratic behavior during trial. At the very outset of the trial, appellant betrayed precisely the inability to relate to his lawyer that could have been predicted from his addiction. Without telling his lawyer what he wanted to say, appellant asked to talk to the judge personally. He accused his counsel of advising him to plead guilty against his wishes and of refusing to subpoena witnesses that appellant desired to have appear. (Tr. 2). Appellant's counsel emphatically denied these accusations, stating that they

were absolutely untrue. Court-appointed counsel went on to state that "the defendant doesn't like my counseling; he doesn't agree with anything that I have done . . ." and offered to withdraw from the case. (Tr. 3-4). He said that in his ten years of representing defendants by appointment "this is the first time this has occurred to me" (Tr. 4) -- certainly an indication to the court that something more than a minor personality clash was involved. The lawyer-client relationship deteriorated during the course of the trial. At a later point appellant again approached the bench and accused his counsel of "telling the jury I was guilty to this charge contrary to my wishes." (Tr. 90). The opinion below characterizes this "outburst" as arising from "a natural confusion created by the defense burden of presenting a factual defense and an insanity defense . . . at the same trial." (Opinion p. 9). The initial reaction of the trial court to this accusation, however, was to deny that counsel had told the jury that appellant was guilty, and not to clarify matters in order to rid appellant of his "natural confusion." (Tr. 90).

The trial court was also made aware that of the doctors appellant had requested his counsel to subpoena as

defense witnesses, one was not connected with the hospital and another had never seen appellant.

Finally, appellant's distrust of his lawyer may have been what kept him from testifying in his own behalf, which may in turn have severely damaged his defense. Counsel advised that appellant should testify. Appellant consistently refused to do so (Tr. 87, 94), even though he relied on the defense of lack of criminal responsibility and the psychiatrict testimony, which had been given by the time his decision not to testify was made known, was such that this Court was to hold that the trial court was justified in not presenting the question to the jury. Heard v. United States, 121 U.S. App. D.C. 37, 348 F.2d 43 (1965).

The legal standard of competence includes both a "rational as well as factual understanding of the proceedings against him" and a "present ability to consult with his lawyer with a reasonable degree of rational understanding." Dusky v. United States, 362 U.S. 402 (1960). As in Pouncey v. United States, 121 U.S. App. D.C. 264, 266, 349 F.2d 699, 701 (1965), appellant's behavior during the course of the trial cast serious doubt on "his ability to consult with his lawyer."

Appellant manifested the typical mental defects common to most chronic narcotics addicts during the course of the trial of his case. Appellant's actions during the trial also supported the impression of his psychological condition that one would derive from the St. Elizabeths records. Appellant's unrelatedness to the proceeding; his inability to communicate meaningfully with his counsel; and his general impulsiveness, feeling of persecution, hostility, and suspiciousness should have put the trial court on notice that appellant may have been incompetent to stand trial.

The trial judge did not view appellant's erratic behavior in a vacuum. He knew from the hospital report before the trial began that appellant was actively addicted to narcotics. He knew from testimony during the trial that appellant's addiction to narcotics was extensive and prolonged. The cumulative effect of all the evidence concerning appellant's possible mental state at the time of the trial constituted evidence of legal incompetence sufficient to raise a bona fide doubt requiring the trial court to order a competence hearing sua sponte after the trial had begun.

III. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS TRIAL AND IN PREPARATION THEREFOR, PARTICULARLY IN THE PREPARATION AND PRESENTATION OF HIS INSANITY DEFENSE.

This Court has often expressed the view that meaningful exploration of the issue of criminal responsibility, as defined in Durham v. United States, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954), depends on the adversary system, in which

> "'[S]pecially motivated persons, and parties and their counsel, * * * makes the best possible case for their side. The parties present 'their' witnesses, 'their' versions of events, 'their' theories of law. Such a model requires that the parties engage in a constant process of 'correction' of the adversary's material. Witnesses must be penetratingly cross-examined, opposing versions of events comprehensively presented, and conflicting * * * theories crisply propounded.'" Jackson v. United States, 118 U.S. App. D.C. 341, 346, 336 F.2d 579, 584 (1964).

Here the adversary system collapsed because of the distrust between appellant and his court-appointed counsel and because court-appointed counsel proved to be insufficiently expert in presenting the insanity defense. The distrust resulted in a situation in which, for all that appeared in the record, court-appointed counsel may have been unaware of certain witnesses appellant wished to have called until the beginning of trial. (Tr. 2-3).

Subpoenas were issued from the bench for witnesses desired by appellant at the beginning of the second day of trial (Tr. 65) and the subpoenaed witnesses began to testify on that very afternoon (Tr. 76). Counsel's examination of each of the witnesses, three hospital psychiatrist who had seen appellant only briefly during the course of the medical conference concerning appellant's diagnosis, (Tr. 77, 84, 91), lasted only a few minutes. In eliciting the testimony of two of the psychiatrists, counsel consistently phrased his questions in terms of the appellant purchasing or procuring narcotics when the indictment charged sale of narcotics. (Tr. 78, 81, 86). When the trial court pointed this out, counsel stated that he would "relate this up at a later time," but he never did. (Tr. 86). Counsel's presentation of the insanity defense was, therefore, couched in terms that could not avoid hypothetical answers of no value to the defense. As a result, the evidence presented was held to be insufficient to require an insanity instruction, since the testimony "was premised on hypothetical facts not supported by evidence in this record." Heard v. United States, 121 U.S. App. D.C. 37, 39, 348 F.2d 43, 45 (1965). And appellant, distrustful of counsel, refused to accept his advice to take the stand and attempt to bolster the psychiatric testimony.

These facts support a conclusion that appellant had ineffective assistance of counsel in the preparation and presentation of his insanity defense; at the least they give rise to a necessity for further inquiry on the part of the court below, which heard the Section 2255 motion.

The court below rejected appellant's claim of ineffective assistance of counsel as successive, in that it had been "heard and determined previously." (Opinion p. 3). The point was not raised in briefs or argument on appellant's direct appeal of his conviction. The court below, however, viewed Chief Judge Bazelon's suggestion, upon the denial of appellant's petition for rehearing en banc, that the insanity defense was poorly presented as raising an ineffective assistance of counsel issue. Ibid. The statement of Judge Bazelon is seen as stimulating the majority of the panel that had affirmed appellant's conviction to consider the claim and decide it adversely to appellant. In this view of the proceeding, footnote 7 of the majority opinion disposed of the claim, since the footnote states that "the majority of this court do not . . . share Judge Bazelon's view that trial counsel's performance was deficient." Heard v. United States, 121 U.S. App. D.C. 37, 41, 348 F.2d 43, 46 (1965).

The usual test for determining whether a claim in a Section 2255 proceeding is successive is whether "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." Sanders v. United States, 373 U.S. 1, 15 (1963). The Supreme Court has stated that the second consideration means that "the prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application." Id. at 16. Accepting the conclusion of the opinion below that the Sanders criteria are applicable to the instant case, in which the prior proceeding was a direct appeal and not a Section 2255 proceeding, appellant contends that there has been no prior determination on the merits of the issue of ineffective assistance of counsel.

When Judge Bazelon raised the question of inadequate presentation of the insanity defense by counsel, he phrased the question in terms of a personal observation. He had already stated that he would have granted the petition for rehearing en banc because he agreed with the dissenting member of the panel that the question of

appellant's responsibility should have been put to the jury. He went on to say that the insanity defense was "so poorly presented as to raise fundamental questions about the adequacy of the defense afforded indigent persons." Heard v. United States, 121 U.S. App. D.C. 37, 44, 348 F.2d 43, 50 (1965). Furthermore, Judge Bazelon stated that "it might be unfair to blame appointed trial counsel in this and other cases for past inadequacies in the presentation of the insanity defense . . .." Id. at 45, 348 F.2d at 51. In light of this, we submit that the ineffective assistance of counsel issue, if "raised" at all, was presented in only the most general terms and the facts supporting the contention of inadequate assistance of counsel were never sufficiently developed as they would have been had the issue been raised in an adversary context. In the absence of this kind of factual showing to support the claim, there cannot be an adverse determination on the merits such as to preclude a full hearing of this issue in a collateral attack.

CONCLUSION

The judgment below should be reversed. If the determination of this Court is that appellant was entitled to a hearing on his competence to stand trial, the case

should be returned to the trial court with directions to set aside appellant's conviction, conduct a competence hearing and hold a new trial if he is found competent. A nunc pro tunc hearing on competence will not do, as the court below recognized. See Pate v. Robinson, 383 U.S. 375, 386-87 (1966); Dusky v. United States, 362 U.S. 402 (1960); Hansford v. United States, U.S. App. D. C. , 365 F.2d 920, 930-31 (1966). If the judgment is that appellant is entitled to a hearing on his assertion that he did not have the effective assistance of counsel, the case should be returned to the District Court for further proceedings in the Section 2255 case.

Respectfully submitted,

WILLIAM H. ALLEN
(By appointment of this Court)
PETER J. NICKLES
701 Union Trust Building
Washington, D.C. 20005

Attorneys for Appellant

March 10, 1967

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,325

CHRISP HEARD, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JUDITH ANN WILSON,
THEODORE WIESEMAN,
Assistant United States Attorneys.

C.A. No. 200-66
Cr. No. 84-63

QUESTIONS PRESENTED

1. Whether there were circumstances in the record that should have created such a substantial doubt about appellant's competency to stand trial as to require the trial judge to order a competency hearing *sua sponte*? If so, can appellant raise such a claim on a 2255 motion when the files and records of the case show that appelant was competent and appellant does not contend otherwise?

2. Whether appellant can raise ineffective assistance of counsel on a 2255 motion after the Court has already ruled on the merits of the claim adversely to appellant on direct appeal?

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant is serving a sentence of ten years' imprisonment imposed on December 6, 1963, by the Honorable Edward M. Curran after a jury had convicted appellant of narcotics offenses in violation of 21 U.S.C. § 174 and 26 U.S.C. §§ 4704(a), 4705(a). The instant appeal is from a denial of a motion to vacate sentence under 28 U.S.C. § 2255. The pertinent facts may be stated as follows:

1. *Pre-trial Proceedings*—Appellant's arrest occurred on December 14, 1962, and his trial began on October 21,

1963. He was unable to furnish the bond set at the time of his arrest. Accordingly, he remained in custody during the ten months between his arrest and his trial.

On March 11, 1963, appellant filed a handwritten, *pro se* motion for a mental examination alleging that he was addicted to drugs, became depressed when not using drugs, heard voices, and on several occasions in the past had believed someone wished to kill him. Eleven days later, his attorney filed a typewritten petition for an examination into appellant's competency to stand trial. Supporting the petition were averments that appellant remembered some, but not all, of the events charged in the indictment, that he heard voices, and that he had used narcotics for eight or nine years. The court committed appellant to St. Elizabeths Hospital; and three months later, June 21, 1963, the hospital reported:

> As a result of our examinations and observation, it is our opinion that Chrisp Heard, Jr. is mentally competent to stand trial. It is further our opinion that on or about October 22, 24, and 26, 1962, Mr. Heard was actively addicted to narcotics, and that the criminal acts with which he is charged, if committed by him, were causally related to his narcotic addiction. However, it is also our opinion that Mr. Heard's condition of drug addiction does not constitute a mental illness, nor is it related to, or a result of, mental illness. It is therefore our opinion that there is no mental disease or defect at the present time, nor on or about the dates in question.

Neither appellant nor the government requested a hearing on the hospital's finding of competency to stand trial, and none was held.

2. *Hospital Records*—The trial court did not see the records of St. Elizabeths Hospital on appellant's pre-trial mental examination until the 2255 proceedings below. Those records, which are part of the record on appeal, are in four parts: (1) a summary of psychological tests prepared on April 26, (2) a report of a social worker's

interviews with members of appellant's family, (3) a clinical study dated May 30 by the resident in psychiatry who prepared appellant's case, and (4) the report of the medical staff conference on June 13.

The summary of the results of the psychological tests stated that appellant had "a passive-aggressive personality functioning intellectually within the high average and the low dull-normal range . . ., he also displays some schizoid and paranoid features and he is quite anxious and so emotionally immature that he could act out in an impulsive manner under stress" (Psychological, p. 1). The notation in the summary of impulsive and schizoid features in appellant's personality derived from appellant's having given "several impulsive superficial answers" on the IQ tests (Psychological, p. 2). However, "[n]o pervasive disorganization or clear cut bizarre responses were shown" *(ibid.)*. The projective tests[1] showed that appellant's personality was only superficially integrated in that he tended to deal with aspects of his environment in an arbitrary fashion. The same tests showed evidence of sexual preoccupation and maladjustment, hostility and aggression, insecurity, and a need for personal relationships. The psychologist concluded, "despite these difficulties, the patient's verbalizations of his thinking are generally coherent, and he shows no clear-cut pathological indications to warrant a psychotic diagnosis." *Ibid.*

The social worker interviewed members of appellant's family and gathered background information. Appellant's mother, with whom he had lived most of his life, never heard him mention hearing voices, although he sometimes talked to himself. (Social Service Report, p. 2).

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[1] The psychologist report shows (p. 1) that appellant took three projective tests: The Bender-Gestalt Test in which the patient copies various geometric designs, the Rorschach Personality Assessment in which he gives his interpretations of complex inkblots, and a projective drawings test in which he sketches designated objects and later comments on them. Our descriptions of the tests are taken from Noyes and Kolb, *Modern Clinical Psychiatry* 130-132 (6th ed. 1963).

The psychiatric study by the resident in psychiatry discusses the psychological tests, the social worker's investigation, personal history, military service, criminal record, prison records, the records of a commitment to the Federal Narcotics Hospital in Lexington, Kentucky, a medical examination at the hospital, observations of appellant's behavior at the hospital, and the resident's personal interview with appellant. In all this, the resident found no history of mental illness, "no history of unusual neur[otic] traits," no indications of any abnormalities or defects—except for appellant's being addicted to drugs, one of his cheeks was larger than the other, and he needed glasses (Psychiatric Case Study, pp. 1-6, 1, 4). The resident reported the findings of his psychiatric examination of appellant as follows (*id.* at 5-6):

> *Speech:* Speech is relevant and coherent without looseness. Vocabulary is greater than that that might be more frequently found in a person of only eighth grade education.
>
> *Emotional Reaction:* Affect was within normal range. He did not appear unduly despondent or dejected nor with any elation noted.
>
> *Abnormal Content or Trends:* The patient denied abnormal mental content in the way of hallucinations or delusions in the past and the present and there was no evidence of such. There was no evidence of previous suicidal preoccupation nor of ruminations about such at the present.
>
> *Mental Grasp and Capacity:*
>
> *Attention, Perception and Comprehension:* These all appear to be within normal range and without abnormal deviation.
>
> *Orientation:* The patient was precisely oriented in all three spheres.
>
> *General Intelligence:* General fund of information including vocabulary would appear greater than that usually found in a person with only an eighth grade education.

Memory: Memory was good for both recent and remote events.

Insights and Judgment: The patient wonders why he takes drugs stating that they afford him no real lasting satisfaction, he knowing all the while that the possibility of his being arrested and imprisoned is very real and relatively inescapable. He does mention that he has noticed he is most satisfied within an institution either of a penal sort or hospital and finds this inexplicable. Feels that people out on the street that do not care are more concerned with their own goals and aspirations with no thought to others and at times active[ly] hostile. He notes that when he is taking drugs that the unconcern of others [does] not bother him.

At the medical staff conference, appellant was in "good contact," related well to the conference, responded appropriately, and "his speech at all times [was] relevant and coherent" (Medical Staff Conference, p. 1). Near the end of the interview, appellant became emotionally distressed and cried, saying that he was ashamed to find himself in such difficulties and that his family had never understood or accepted him. The conference concluded that although some features of a passive-aggressive type personality were present, they did not amount to the symptoms of mental illness. Accordingly, the conference diagnosed appellant as without mental disorder and competent to stand trial. (*Id.* at 2).

3. *The Trial*—Before the trial began, appellant alleged to the court that his appointed counsel had asked him to plead guilty and had refused to subpoena certain psychiatric witnesses. Counsel denied the truth of the allegations and asked to be relieved of his appointment. Counsel said he had never asked appellant to plead guilty, although he had given his personal opinion at appellant's request; appellant had not requested counsel to subpoena any witnesses; counsel had summoned one doctor; and counsel had spoken to ten or twelve psychiatrists but none would testify for the defense. The court denied counsel's

request to withdraw from the case and told appellant to bring into court the list of witnesses he wished to subpoena (appellant had left the list at the jail). Later, the court issued the subpoenas. (Tr. 2-4, 65, 74-76).

Appellant had requested subpoenas for four witnesses from St. Elizabeths Hospital—three psychiatrists who had attended the medical staff conference and the psychologist who had administered the psychological tests (Tr. 74-75; Hospital Records). The three psychiatrists testified at the trial. After speaking to the psychologist, counsel decided that his testimony would not assist the defense and did not call him (Tr. 88). In addition, defense counsel had another doctor available to testify but withheld his testimony until after the psychiatrists from St. Elizabeths had testified, and then chose not to call him (Tr. 72).

The three psychiatrists testified that appellant had been addicted to narcotics but had not been suffering from any mental disease or defect (Tr. 77, 78, 82, 84-87, 91, 93). During his examination of two psychiatrists, defense counsel inquired whether appellant's addiction and resulting mental state would cause him to "purchase" or to "procure" narcotics (Tr. 78, 79, 80, 81, 86). Later, before the jury returned to the courtroom from a recess, appellant announced that he wanted new counsel because his trial counsel had inferred his guilt to the jury. The court answered that appellant's allegation was untrue and refused to appoint new counsel.

Contrary to the advice of counsel, appellant chose not to testify at the trial (Tr. 87, 94).

4. *Direct Appeal*—On appeal, appellant contended that the trial judge erred in not instructing the jury on entrapment and insanity at the time of the offense. This Court, with one judge dissenting, wrote an opinion affirming the conviction. *Heard* v. *United States*, 121 U.S. App. D.C. 37, 348 F.2d 43 (1965). The Court, with four judges dissenting, denied a petition for rehearing *en banc*. In his statement of reasons why the petition for rehearing *en banc* should have been granted, Chief Judge Bazelon observed (*id.* at 44-45, 50-51):

Although the insanity charge was not only required but requested, the defense was so poorly presented as to raise fundamental questions about the adequacy of the defense afforded indigent persons. Defense counsel called three psychiatrists. The total time consumed by their testimony, including qualification and cross-examination, cannot have exceeded twenty minutes. Other than reference to Heard's statement that he had been using drugs since the 1940's, there was a complete absence of testimony about his personal history. Other than conclusory statements to the effect that he was "without mental disease or defect," there was no testimony about his personality structure or mental condition. There was no explanation of the relationship of drug addiction to mental disease. Indeed, there was no meaningful exploration even of Heard's addiction process.

* * * *

It might be unfair to blame appointed trial counsel in this and other cases for past inadequacies in the presentation of the insanity defense. We must bear in mind that counsel either volunteers or is drafted to serve without compensation and at great inconvenience and cost to himself. "[I]t is very often necessary to appoint lawyers who understandably know little about [criminal] practice, and even less about the special difficulties of presenting the insanity defense. The Bar has responded beyond the call of duty and good will." More important, until relatively recent years it had not been made clear that the insanity defense requires behavioral information in depth, and that defense counsel, prosecutor and court have a duty to insure an adequate presentation for an indigent defendant. New understanding requires abandonment of old practices. It is not necessarily criticism of those who acted in accordance with prior understandings to say that a great deal more than was offered in this case is now required to maintain the integrity of the adversary system. [Footnotes omitted].

On the day that the statement of reasons was filed, the panel that had decided the case filed an amendment to its opinion. The amended opinion stated (*id.* at 40 n.7, 46 n.7):

> The majority of this court do not, however, share Judge Bazelon's view that trial counsel's performance was deficient.

5. *Collateral Attacks on Conviction*—Appellant's first collateral attack on his conviction was a petition for a writ of habeas corpus filed on September 12, 1965, alleging ineffective assistance of counsel. The government answered that the writ of habeas corpus did not lie because the remedy under 28 U.S.C. § 2255 was adequate and that this Court had ruled adversely to appellant on the ineffective assistance contention in its amended opinion on direct appeal. The district court entered an order dismissing the petition on September 27. (See proceedings in *Heard* v. *Anderson*, H.C. 424-65). On December 9, 1965, this Court denied leave to appeal *in forma pauperis* (Misc. No. 2652).

On January 26, 1966, appellant filed the motion involved in the instant appeal, a motion to vacate sentence pursuant to § 2255 alleging ineffective assistance of counsel. The motion was denied without a hearing on May 16, 1966. This Court granted leave to appeal *in forma pauperis*, and later granted appellant's motion to remand the case to the district court to permit appellant to amend his 2255 motion. The amended motion added to the earlier ineffective assistance of counsel claim a new contention relating to incompetency to stand trial.

Judge Curran filed an opinion denying the amended motion without a hearing because the files and records showed appellant was not entitled to relief. *Heard* v. *United States*, 263 F.Supp. 613 (D.D.C. 1967). Judge Curran ruled that the ineffective assistance claim was not available to appellant on collateral attack because the merits of the claim had been determined adversely to appellant on direct appeal, and that "insufficient evidence

of mental incompetency existed at trial to raise a *bona fide* doubt requiring the trial judge *sua sponte* to order a hearing" (*id.* at 617-618).

STATUTE INVOLVED

Title 28 U.S.C. § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final

judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

SUMMARY OF ARGUMENT

I

On a 2255 motion, appellant can obtain relief if he shows a denial of a fundamental constitutional right at trial. Incompetency to stand trial involves such a fundamental constitutional right, but the files and records of the case conclusively show that appellant was competent to stand trial, and appellant does not contend to the contrary. The only other ground of relief available to appellant under Section 2255 would be a denial of due process of law arising from the trial judge's failure to act *sua sponte* to hold a competency hearing after circumstances in the record created a substantial doubt about appellant's competency. Nothing in the instant record created such a substantial doubt. Moreover, even if the record did reflect that such a doubt might have arisen at trial, appellant cannot obtain relief under Section 2255 in the particular circumstances of this case; for the files and records of the case show that in fact appellant was competent.

II

Appellant cannot raise ineffective assistance of counsel on the instant 2255 motion because the court decided the merits of the question adversely to appellant on direct appeal. In any event, counsel's representation was not constitutionally defective.

ARGUMENT

I. None of the events before or during trial created such a substantial doubt about appellant's competence to stand trial as to require the trial judge to order a competency hearing *sua sponte;* and even if such a doubt did arise, appellant is not entitled to relief under Section 2255 because the files and records of the case show that he was competent.

(Tr. 2-4, 65, 72, 74-88, 90-94.)

Appellant contends that his conviction should be vacated under 28 U.S.C. § 2255 because the trial court never held a hearing on the report of St. Elizabeths Hospital finding appellant competent to stand trial. He argues that a competency hearing was required for two independent reasons —(1) because the hospital report was written in conclusory terms and appellant was a narcotics addict (App. Br. 20-35), and (2) because appellant behaved strangely during the trial (App. Br. 35-39). The brief supporting these two arguments contains an earnest and scholarly presentation of the psychological effects of heroin addiction. We disagree with some of the conclusions appellant would draw from the materials on which he relies, but more important, we disagree with the manner in which the issues have been framed; for we thing appellant has misconceived the nature of the 2255 remedy.

The instant case is not a direct appeal from a conviction; it is a collateral attack on the conviction under 28 U.S.C. § 2255.[2] Not every error can be raised in a 2255 proceeding; for a 2255 motion is not a substitute for an appeal.[3] The narrow class of errors that can be raised under Section 2255 has been defined by Judge Henry

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[2] Section 2255 is the writ of habeas corpus for federal prisoners. There are procedural differences between a 2255 motion and habeas corpus but the substantive content of the two remedies is the same. *Hill* v. *United States*, 368 U.S. 424, 427 (1962).

[3] *E.g., Thornton* v. *United States*, —— U.S. App. D.C. ——, 368 F.2d 822, 825-826 (1966).

Friendly of the Court of Appeals for the Second Circuit in the following language:

> Applying the standards, * * * we shall assume arguendo—in all likelihood too favorably for appellant, and without qualifications which may well be needed in other factual settings—that he should have relief under § 2255 if he has shown (1) a significant denial of a constitutional right, even though he could have raised that point on appeal and there was no sufficient reason for not doing so; * * * or (2) a defect seriously affecting his trial, even though not of constitutional magnitude, if it was not correctible on appeal or there were "exceptional circumstances" excusing the failure to appeal.[4]

Under these principles, the law is settled that insanity at the time of the offense, an evidentiary matter for the jury to determine at trial, cannot be raised but that incompetency to stand trial, an error of constitutional magnitude, can be raised under Section 2255.[5]

Until recently, there was only one way in which incompetency to stand trial could be raised on a 2255 motion, the way in which the contention was raised in such cases as *Sanders* v. *United States*, 373 U.S. 1 (1963), and *Bishop* v. *United States*, *supra* note 5. In those cases, the incompetency contention was raised in the same manner as any other contention has traditionally been raised on collateral attack. The prisoner filed a motion alleging

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[4] *United States* v. *Sobell*, 314 F.2d 314, 322-323 (2d Cir.), *cert. denied*, 374 U.S. 857 (1963). *Accord*, *e.g. Hill* v. *United States*, *supra* note 2, at 428; *Sunal* v. *Large*, 332 U.S. 174, 178-180 (1947); *Stirone* v. *United States*, 341 F.2d 253, 257 (3d Cir.), *cert. denied*, 381 U.S. 902 (1965). As Judge Friendly's opinion indicates, not every denial of a constitutional right can be raised. The criteria defining which constitutional rights can be raised are set forth in this Court's opinion in *Thornton* v. *United States*, *supra* note 3, 825-829 (holding that illegal search and seizure *cannot* be raised).

[5] *E.g.*, *Bishop* v. *United States*, 96 U.S. App. D.C. 117, 119-120, 223 F.2d 582, 584-585 (1955), *rev'd on other grounds*, 350 U.S. 961 (1956).

facts that showed, if true, he had been incompetent at the time of the trial. If the government's answer alleged other facts contradicting the prisoner's allegations, the prisoner was entitled to an evidentiary hearing to resolve the disputed factual issues. If the trial judge found the facts in the prisoner's favor, the prisoner's 2255 motion was granted; otherwise, it was denied. In essence, the traditional way of resolving the issue was a *nunc pro tunc* hearing at the time of the motion to determine whether the prisoner was actually incompetent at the time of the trial.

In 1966 the Supreme Court decided *Pate* v. *Robinson*, 383 U.S. 375, which introduced a new concept into competency to stand trial. In that case, involving a federal habeas corpus petition by a state prisoner, there was no *nunc pro tunc* hearing to determine competence at the time of trial. Indeed, there was no evidentiary hearing at all. Instead, the Supreme Court read the trial transcript and determined that there was evidence before the trial judge raising a doubt about the prisoner's competency to stand trial. The Court ruled that procedural due process of law is violated when a trial judge disregards evidence before him raising a "substantial doubt" [6] about competency and goes forward with the trial. Due process requires the judge to stop the trial *sua sponte* and hold a competency hearing. See *id.* at 384. In fashioning relief, the Supreme Court did not follow the traditional rule of the *Sanders* and *Bishop* cases requiring a *nunc pro tunc* competency hearing. Instead, the Court emphasized "the difficulty of retrospectively determining an accused's competence to stand trial," citing *Dusky* v. *United States*,

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[6] Except for a reference to the statutory standard in Illinois of a "*bona fide* doubt" (383 U.S. at 385), the *Robinson* opinion did not define precisely the nature of the "doubt" about competency that requires the trial court to act *sua sponte* to hold a competency hearing. This Court has interpreted *Robinson* to require a "substantial doubt." *Powell* v. *United States*, D.C. Cir., No. 20102, December 28, 1966 (slip opinion 3); *Hansford* v. *United States*, —— U.S. App. D.C. ——, 365 F.2d 920, 923 (1966).

362 U.S. 402 (1960),[7] and ordered a new trial instead of a competency hearing.

As the Court ruled recently, *Pate* v. *Robinson* did not overrule *Sanders*.[8] The two cases represent two entirely different principles. As indicated earlier (pp. 11-12, *supra*, the writ of habeas corpus and the Section 2255 motion are not ordinary writs of error; they deal with fundamental constitutional errors. It is clear that a prisoner cannot use Section 2255 to obtain a new trial by merely alleging that he was incompetent to stand trial; he must prove his allegation, requiring an evidentiary hearing at the time of the motion to determine competency retrospectively at the time of the trial. The *nunc pro tunc* hearing is essential because, without such a hearing, the prisoner has not proved his allegation of incompetency and is not entitled to 2255 relief. Accordingly, this Court has pointed out that when the question is raised on a 2255 motion, "The only possible way to determine the question of competence to stand trial in this situation is by retrospective hearing."[9]

A different remedy was ordered in *Pate* v. *Robinson*, a new trial instead of a retrospective hearing, because that case involved a different kind of constitutional error. In *Robinson*, there was a procedural infirmity that amounted to a violation of due process of law in the trial judge's disregard of evidence raising a substantial doubt about competency. The prisoner did not have to prove his incompetence at a hearing to obtain relief; it was sufficient for him to prove the procedural defect. Therefore,

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[7] The *Dusky* rule, that the Court will order a new trial instead of a hearing to determine competency retrospectively, is the rule where the issue is raised on direct appeal. In the direct appeal cases the issue was raised before trial and the court committed error in resolving it. In those circumstances, the courts have held that the accused should not be saddled with the trial court's error and should receive a new trial instead of facing the difficulties of a retrospective competency hearing.

[8] *Hansford* v. *United States*, *supra* note 6, at 926 n. 16.

[9] *Ibid.*

after having shown a procedural error at his trial constituting a denial of due process, the prisoner received a new trial.

In summary, relief under Section 2255 is available in two situations: (1) when the prisoner proves his incompetence to stand trial at a 2255 hearing as in *Sanders;* and (2) when he shows a constitutional error in the procedures for determining competency as in *Pate* v. *Robinson.*

Appellant has not sought 2255 relief under the *Sanders* rule; indeed, his amended 2255 motion in the district court never claimed that he was actually incompetent. In fact, the files and records of the case show that he was competent to stand trial. Since he was in custody during the ten months between his arrest and trial, appellant cannot claim that he was under the influence of heroin or suffering withdrawal symptoms during the trial.[10] Whether or not appellant was incompetent turns on his mental state when not taking heroin. Appellant was examined under such conditions before trial at St. Elizabeths Hospital. The hospital's records of the examination are in the record on appeal and show that appellant was manifestly competent to stand trial, as defined to require "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as a factual understanding of the proceedings against him." [11] The hospital's records show that

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[10] *Compare Hansford* v. *United States, supra* note 6. A heroin addict who is suddenly deprived of his supply suffers intense physical pains called withdrawal symptoms. The severity and duration of the pains depends on the size of the habit and the individual idiosyncrasies of the particular addict. However, the symptoms disappear within 10 days and physiological traces in the body vanish within six months. Jaffe, "Drug Addiction and Drug Abuse," in *The Pharmacological Basis of Therapeutics* 293-294 (Goodman & Gilman ed. 1965); Isbell, "Clinical Research on Addiction in the United States," in *Narcotic Drug Addiction Problems* 123 (Livingston ed. 1963); Noyes & Kolb, *Modern Clinical Psychiatry* 477 (6th ed. 1963); Wikler, *Opiate Addiction* 35-36 (1953).

[11] *Dusky* v. *United States,* 362 U.S. 402 (1960).

appellant had a clear and rational understanding of the proceedings against him; that he was "precisely oriented;" had normal attention, perception, comprehension, and memory; suffered no delusions or hallucinations; and was neither psychotic nor out of touch with reality. Counter-statement, pp. 4-5, *supra*. Whether or not appellant's symptoms of a passive-aggressive personality were sufficiently severe to amount to a mental disorder is not pertinent to his competence to stand trial; for such a personality disorder in no way effects his understanding and perception of reality.[12] Since the files and records of the instant case contain the full records of the hospital showing appellant's competency to stand trial, he was not entitled to an evidentiary hearing or any other relief. Section 2255 explicitly provides that if "the files and records of the case conclusively show that the prisoner is entitled to no relief," the prisoner's petition is to be dismissed without an evidentiary hearing.

Since appellant has not contested, and could not contest, his competency in fact, he can obtain relief under Section 2255 only by bringing his case under *Pate* v. *Robinson* and showing a denial of due process because circumstances before or during trial created a substantial doubt about competency that the trial judge disregarded. As for his first contention, that the trial judge was required to order a competency hearing *sua sponte* because the hospital's report was conclusionary and because he was a drug addict, that contention cannot be raised on a 2255 motion; for nothing in the Constitution required the trial judge to order a competency hearing for these reasons, and the 2255 motion is available only to remedy the

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[12] The passive-aggressive personality disorder does not affect thought, perception, or other mental processes affecting the patient's comprehension and appreciation of reality. Rather, the disorder derives from "failure to attain a mature emotional development of the personality," or inability to delay or control drives and to establish mature personal relationships. Noyes & Kolb, *supra* note 10, at 64, 458-459. Such a disorder cannot affect competency to stand trial within the meaning of *Dusky* v. *United States*, *supra* note 11.

deprivation of fundamental constitutional rights. Indeed, not only was there no constitutional error, there was no error at all. This Court has rejected the contention that the trial judge must order a competency hearing whenever the hospital report is stated in conclusionary terms,[13] as well as the contention that a hearing must be ordered whenever the trial judge learns that the accused is a heroin addict.[14] In short, neither the conclusionary nature of the report nor the fact of drug addiction created a substantial doubt within the meaning of *Pate* v. *Robinson*.

There remains appellant's second contention, that his behavior at trial was so bizarre as to require a hearing during trial. However, this case is unlike *Pate* v. *Robinson* where there was a long history of mental illness and both the accused and the government requested a hearing, and unlike *Pouncey* v. *United States*, 121 U.S. App. D.C. 264, 349 F.2d 699 (1965), where the accused acted irrationably at trial. The most that the record in the instant case shows is dissatisfaction with appointed counsel and disagreement over trial strategy. No court, to our knowl-

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[13] *Whalem* v. *United States*, 120 U.S. App. D.C. 331, 335 n.6, 346 F.2d 812, 816 n.6 (*en banc*), *cert. denied*, 382 U.S. 862 (1965). We do not understand *Whalem* to be inconsistent with *Pate* v. *Robinson*. Both cases agree that the trial judge is not required to order a hearing *sua sponte* unless circumstances in the record create a doubt about the accused's competency. *Robinson* requires a "substantial doubt" (see note 6, *supra*), while *Whalem* uses the language "substantially suspect" (120 U.S. App. D.C. at 335 n.6, 346 F.2d at 816 n.6).

[14] *Powell* v. *United States*, *supra* note 6. We cannot agree with appellant's argument that the fact of narcotics addiction makes it probable that the accused is incompetent to stand trial. To the contrary, we think that the very fact of addiction makes it improbable, not probable, that the accused is incompetent. Very few heroin addicts suffer from psychosis or other mental diseases that would affect their rational and emotional grasp on reality. The foremost authority on narcotics addiction finds that addicts falls into five groups: (1) healthy, (2) psychoneurotic, (3) character disorders, (4) personality disorders, and (5) inadequate or sociopathic personalities. Kolb, *Drug Addiction, A Medical Problem* 39 (1962). None of these conditions is likely to render an accused incompetent for trial.

edge, has ever suggested that the legal profession has attained such a level of perfection as to require a doubt about the mental competency of a man who is dissatisfied with his attorney. We do not think that the incidents at trial to which appellant cites the court approach the type of circumstances involved in *Robinson* and *Pouncey*.

Finally, even if the events before or during trial had created a substantial doubt about appellant's competency, we do not think that appellant would be entitled to 2255 relief in the circumstances of this case. This case is unlike *Robinson* and *Pouncey* in that the record in this case contains the records of the hospital showing that appellant was in fact competent to stand trial. The purpose of the *Robinson* rule is to protect the integrity of the judicial system by requiring reasonable steps to insure that incompetent defendants do not slip through the system unnoticed. However, this is not appellant's case; for the files and records show that he was competent, and he does not contend otherwise. We respectfully submit that an accused cannot invoke *Robinson* on a 2255 motion when there is no question of his actual competence to stand trial.[15]

II. Appellant's claim of ineffective assistance of counsel was determined adversely to him on direct appeal and cannot be raised again on a 2255 motion.

Appellant contends that the assistance rendered by his appointed counsel at trial was constitutionally ineffective (App. Br. 40-44). He bases his contention exclusively on matters appearing in the trial transcript and alleges no new facts outside the record. On appellant's direct appeal from his conviction, this Court had occasion to rule on

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[15] We recognize that appellant's mental condition might have changed during the four months between the hospital report and the trial. See *Pouncey* v. *United States*, *supra* at 265, 700. But appellant makes no such contention, and if he is relying on a deterioration during the four months, we think it is incumbent on him to allege such facts in his 2255 motion, giving the government an opportunity to controvert them, before he is entitled to relief.

the merits of appointed counsel's representation at trial and found that it was adequate. Counterstatement, p. 8, *supra*. Since the Court has already ruled one time on the merits of trial counsel's representation, appellant cannot advance the very same contention a second time on collateral attack.[16]

In any event, the transcript of the trial does not show ineffective assistance of counsel in the constitutional sense, which requires that the counsel's representation be "so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce . . . ." [17] Moreover, appellant places his heaviest reliance on the opinion accompanying the dissent of Chief Judge Bazelon from the denial of appellant's petition for a rehearing *en banc;* and as we understand the opinion, it focuses not so much on counsel's representation at appellant's trial as on the way in which the insanity defense must be presented at future trials. See Counterstatement, pp. 6-7, *supra*.

CONCLUSION

THEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JUDITH ANN WILSON,
THEODORE WIESEMAN,
Assistant United States Attorneys.

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[16] *E.g., Sanders* v. *United States*, 373 U.S. 1, 15 (1963); *Thornton* v. *United States*, —— U.S. App. D.C. ——, 368 F.2d 822, 832-833 (1966) (dissenting opinion).

[17] *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 63, 259 F.2d 787, 793, *cert. denied*, 358 U.S. 850 (1958).

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REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,325

CHRISP HEARD, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Columbia

WILLIAM H. ALLEN
(By appointment of this Court)
PETER J. NICKLES
701 Union Trust Building
Washington, D.C. 20005

Attorneys for Appellant

April 19, 1967

INDEX TO CITATIONS

*/ Cases principally relied upon are designated by asterisks.

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REPLY BRIEF FOR APPELLANT

I

Appellant asserts that he is entitled to relief under 28 U.S.C. § 2255 because there should have been, but was not, an independent judicial inquiry into and determination of his competence to stand trial. This judicial inquiry and determination should have taken place before appellant was convicted of the offenses for which he is now serving a sentence. There should have been such an inquiry and determination because appellant was a narcotics addict and the report from St.

Elizabeth's Hospital on appellant's competence to stand trial, which did nothing more than recite the fact of his addiction and conclude that he was competent to stand trial, did not dispel the substantial doubt of appellant's competence raised by his addiction.

The Government contends in reply that "appellant has misconceived the nature of the 2255 remedy." (Gov't Brief p. 11). The Government does not deny that the failure to hold a competence hearing where a substantial doubt exists as to a defendant's competence may provide the basis for collateral attack of a criminal conviction. Rather, its argument is that the case is not cognizable under Section 2255 because the circumstances alleged by appellant are not enough to raise a substantial doubt as to his competence and that any doubt is laid to rest by the records of appellant's mental examination. This is an argument on the merits of appellant's claim, and we are perfectly content to meet the Government on that ground.

The Government acknowledges that, at least since the Supreme Court's decision in Pate v. Robinson, 383 U.S. 375 (1966), a defendant may attack a criminal conviction collaterally for failure of the trial court to safeguard through appropriate procedures the defendant's constitutional right not to be put to trial if he is incompetent. (Gov't Brief pp. 13-14). That is what appellant has attempted to do here. There is no misconception of remedy in this. As the court said in Pate v.

Robinson, "procedures must be adequate to protect this right . . ." not to be put to trial in violation of the Constitution. Id. at 378.[1/]

The only real argument of the Government is that there is no such substantial doubt as to appellant's competence as must lead a court to make further inquiry into his competence. This, as we have indicated, is an argument on the merits and not in any meaningful sense an argument that appellant has misconceived the nature of the Section 2255 remedy. If the record discloses facts that raise a substantial doubt as to a defendant's competence and there has been no judicial inquiry into his competence, his conviction is properly reversed and a new trial ordered on direct appeal, and his conviction is properly set aside and a new trial ordered on collateral review. There is no difference in the issues or the

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1/ Although the acknowledgment by the Government of the authority of Pate v. Robinson makes academic most of its discussion of the historical circumstances in which relief under Section 2255 is available, we would note a dissent from the Government's expressed view that "traditionally" collateral relief has not been available to one who alleges that an improper procedure has been followed in adjudicating one of his trial rights and the suggestion that Pate v. Robinson is thus off the beaten judicial path. (Gov't Brief p. 12). In Jackson v. Denno, 378 U.S. 368 (1964), the petitioner's complaint, upheld by the Supreme Court, concerned the procedure followed by the trial court in determining whether his confession was voluntary.

scope of relief. Collateral relief is available in the same circumstances in which a conviction would be reversed on direct appeal because the hypothesized error is of constitutional dimensions and affects vitally the fairness of the defendant's trial. Cf. Thornton v. United States, ____ U.S. App. D.C. ____, 368 F.2d 822 (1966).

It is possible to discern in the Government's presentation the suggestion of an argument that, with the production in the Section 2255 proceeding of the records of appellant's mental examination at St. Elizabeth's Hospital, a full record has been made and appellant's motion must be dismissed because he does not allege on the basis of that record that he was incompetent. If this argument is intended, it is baseless. The hospital records are no substitute for the full range of the inquiry that should have been held concerning appellant's competence by the court in which he was tried.[1/] Moreover, the records by no means show, as the Government contends, that appellant was competent. Rather they confirm the doubts as to his competence that necessarily arose from his condition. Where those doubts persist the remedy under Pate v. Robinson is a new trial preceded by a proper determination of competence. That is true, as the Pate case, itself a collateral relief case, shows, whether the issue of substantial doubt arises on direct appeal or on collateral attack.

1/ See Dusky v. United States, 362 U.S. 402, 403 (1960).

Without saying so in quite those words, then, the Government is arguing in effect that there was and is now no substantial doubt as to appellant's competence. For this proposition it relies upon its view of the personality qualities of narcotics addicts, upon the showing of appellant's personality qualities in the hospital records to which we have referred and upon authority. In all respects the reliance is misplaced.

The medical literature on the psychological aspects of narcotics addiction is voluminous. In this literature the very clear consensus, if not unanimous view, of those professional medical observers who have studied the problems of narcotics addiction is that, in the words of one of them, "addiction to narcotic drugs is a behavior symptom complex arising from a grave and extensive disturbance of the personality . . . ."[1/] The statement is that of Dr. Karl Easton, former director of the Narcotics Service of Metropolitan Hospital in New York, where extensive work has been done with addicts. He also concluded on the basis of his studies that "the typical addict, helpless in working through anxiety or solving a life problem in the service of the reality principle, seeks narcosis instead."[2/]

1/ Easton, Clinical Studies on the Pathogenesis and Personality Structure of Male Narcotics Addicts, 14 J. of Hillside Hosp. 36 (1965).

2/ Id. at 42.

The weight of expert opinion is overwhelming that the vast majority of addicts are disturbed persons.[1] To be sure, the problems of most of them do not rise to the level of a psychosis, but this is by no means dispositive, as the Government implies.[2] It is quite irrelevant that the St. Elizabeth's Hospital staff conference concluded that appellant's symptoms were not those of "a mental illness," and there is no warrant in the hospital's records or report for the further assertion of the Government that it was on the basis of his not having a mental illness that the conference "diagnosed" appellant as competent to stand trial.[3]

1/ See, e.g., Bowman, Drug Addiction Treatment: Past, Present, Future, 4 Comp. Psych. 145, 148 (1963). ("We now accept the idea that most drug addicts are sick persons and special cases for psychiatric treatment . . . .") Freedman, Drug Addiction: An Eclectic View, 197 J.A.M.A. 878, 879 (1966). ("The addict is a chronically ill patient who responds infrequently to treatment and, in those few cases of total cure, only after a long time.") Kolb, Drug Addiction: A Medical Problem 38 (1962). ("The question whether drug addicts are recruited from the ranks of the mentally ill is frequently raised. Excluding the few normal persons who become addicted through the use of a narcotic in a medical treatment, the answer is affirmative.")

2/ At page 26 of our opening brief, the sentence that reads "Psychopathic addicts are less common" should read "Psychotic addicts are less common."

3/ Indeed, the Government itself says at another point that "whether or not appellant's symptoms of a passive-aggressive personality were sufficiently severe to amount to a mental disorder is not pertinent to his competence to stand trial." (Gov't Brief p. 16).

(Gov't Brief p. 5). This assertion is of a piece with the Government's bald statement of its belief "that the very fact of addiction makes it improbable, not probable, that the accused is incompetent." (Gov't Brief p. 17 n.14). This is an extraordinary statement. For there is no doubt that, regardless whether disorders of the kind that typically afflict narcotics addicts are properly classified as "mental illnesses," the disorders are often of such a nature that they may impair the qualities that are comprehended in the concept of competence to stand trial. Notably, addicts tend to be deceitful, unable to face reality and not able to relate to, or communicate with, other persons.[1/] Plainly, these kinds of disability may prevent a person from having a rational understanding of what is going on around him in the courtroom and from effectively cooperating with his counsel.

We are certainly content that the records of appellant's mental examination at St. Elizabeth's Hospital be looked to, as the Government implicitly asks, in determining whether there was any substantial doubt about appellant's competence. The Government urges that the hospital records show

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1/ "[T]he addict's behavior is characterized by a deceit which is a symptom of his disease." Freedman, Drug Addiction Treatment in a General Hospital, 4 Comp. Psych. 199, 204 (1963).

that appellant was competent. (Gov't Brief p. 16). We believe that an objective reading of those records must leave the reader with a doubt whether the court was dealing with a person who could fairly be put to trial in the expectation that he would be able to cooperate with counsel and participate sensibly in his own defense. As we have pointed out in our opening brief (pp. 28-34), appellant's symptoms were in the pattern that one would expect of a narcotics addict. The hospital records thus confirm the doubts as to appellant's competence that arose from his addiction, doubts that once entertained can be resolved only by a judicial inquiry and not by placing complete reliance on psychiatrists' conclusions.

The Government stands no better in its reliance on authority than it does in its reliance on the general nature of the addict's personality or the records of appellant's examination. The rule of Whalem v. United States, 120 USApp DC 331, 246 F.2d 912 (1965), cert denied, 582 US 872 (1965), ~~120 U.S. 872 (1965)~~, is, to be sure, that there are situations in which a trial court may treat a defendant as competent and proceed to trial on the basis of a conclusionary hospital report. Whether this rule survives Pate v. Robinson, 383 U.S. 375 (1966), has been questioned. Hansford v. United States, _____ U.S. App. D.C. _____, 365 F.2d 920, 925 n.14 (1966). Regardless of this, however, it is perfectly clear from the Hansford case that the rule of Whalem is not automatically applicable where the defendant who is the subject of the conclusionary report is a narcotics

addict. We do not understand Powell v. United States, D.C. Cir. No. 20,102, decided Dec. 28, 1966, as holding the contrary. There the argument of the appellant, as paraphrased by the Court, was the limited one that his competence was suspect because of the possibility that he might have been under the influence of narcotics during his trial. It was this argument that the court rejected, holding in effect that the possibility raised by the appellant was too remote to create a substantial doubt about his competence. Whether the broader argument made here would have prevailed in Powell v. United States we do not pretend to know, but it is clear from the opinion in that case that the argument made here was not the argument rejected by the court there.

II

Without analysis of the facts concerning appellant's conduct during the trial, some of which are summarized in its statement of the case, the Government attempts to dispose of appellant's claim that his erratic behavior during his trial rendered his competence doubtful with a witticism about the state of the perfection of the members of the legal profession. (Gov't Brief pp. 17-18). This will not do. We shall not repeat here the analysis of the incidents during trial that is found in our opening brief. We would say, however, that a lack of faith in counsel such as trial counsel

never encountered before in his experience of ten years; a refusal to heed counsel's advice to take the stand when that appeared to be the only way of salvaging the defense, and the naming of non-existent persons to be subpoenaed (see App't Brief pp. 4-6, 7-8, 36-38) evidence something more than mere dissatisfaction with counsel and disagreement over trial strategy. They evidence a failure of the attorney-client relationship that one must suspect, in the case of a person with the history of the appellant, arose from his inability to relate as most of us do to other human beings. The failure prevented appellant from having the fair trial guaranteed to him by the Constitution.

III

The District Court rejected appellant's claim that he was denied effective assistance of counsel on the ground that that was a question on which he had been heard and that had been resolved against him on his direct appeal. The reference of the District Court was to Chief Judge Bazelon's comment, in his opinion on the denial of rehearing en banc of the affirmance of appellant's conviction, on the implications of the manner of presentation in this case of the insanity defense for the quality of representation of indigent defendants in the District of Columbia.[1/] The Government agrees with us that Judge Bazelon's comment was addressed to this

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1/ Heard v. United States, 121 U.S. App. D.C. 37, 44, 348 F.2d 43, 50 (1965).

question, but it still maintains that the question of adequacy of appellant's representation has been decided -- by the footnote that the panel majority on appellant's direct appeal added to its opinion in response to Judge Bazelon's comment. (Gov't Brief pp. 18-19). We submit that appellant's claim has not been properly heard and determined in the requisite adversary manner. We submit further that the facts related in our opening brief, arising principally from the very inability of appellant to cooperate with his counsel (App't Brief pp. 40-41), give rise to the same misgivings about the quality of appellant's representation that led this Court recently to reverse a criminal conviction in Dyer v. United States, D.C. Cir. No. 20,052, decided March 23, 1967. The facts in this case, though of course not the same as those in the Dyer case, appear to us not to differ in the way they signify inadequacy of counsel's representation.

CONCLUSION

For the reasons stated in our principal brief and in this reply brief the judgment of the District Court should be reversed and the case disposed of in one of the alternative manners suggested in the conclusion to our opening brief.

Respectfully submitted,

WILLIAM H. ALLEN
(By appointment of this Court)
PETER J. NICKLES
701 Union Trust Building
Washington, D.C. 20005

Attorneys for Appellant

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